

A Public Prosecutor v Dato' Hj Azman bin Mahalan

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
A-06B-3 OF 2007

B SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
28 JANUARY 2010

C *Criminal Law — Anti-Corruption Act 1997 — s 10(b)(aa) — Corruptly giving gratification — Whether accused had indeed given the corrupt gratification — Whether receiver of corrupt gratification automatically an accomplice — Prosecution's failure to call material witness, effect of — Anti-Corruption Act 1997 ss 10(b)(aa), 42(1) & 44 — Evidence Act 1950 s 133*

D *Evidence — Accomplice — Corruption cases — Whether receiver of corrupt gratification automatically an accomplice — Whether accomplice competent witness against accused — Anti-Corruption Act 1997 ss 42(1) & 44 — Evidence Act 1950 s 133*

E *Evidence — Adverse inference — Failure of prosecution to call material witness — Corruption case — Failure of prosecution to call person witnessed handing over of corrupt gratification — Effect on prosecution's case*

F The respondent was charged in the sessions court on two counts of giving gratification under s 10(b)(aa) of the Anti-Corruption Act 1997 ('the Act'). The prosecution's case was that the respondent had given SP1 certain sums of money in order to persuade SP1 not to accept an offer of settlement from his bankrupted debtor — SP6 — so that SP6 would remain a bankrupt, thereby

G disabling him (SP6) from contesting the top post in a political organisation. The respondent was a serious contender for that same post. The respondent was convicted and sentenced on both charges by the sessions' court judge but on appeal, the High Court set aside both the convictions and sentences. The prosecution appealed to the Court of Appeal.

H **Held**, allowing the appeal against the first charge:

(1) From the testimonies of the prosecution witnesses (SP1, SP3 and SP10), the Court of Appeal was satisfied that the respondent had indeed given SP1 corrupt gratification. The reason for such

I gratification was the respondent's hidden agenda of wanting to be the head of the Tapah UMNO division. Direct evidence of the respondent's payment being corrupt was abundant, though the prosecutor chose to exercise his prerogative in invoking s 42(1) of the Act (see paras 13–14).

- (2) The fact that the respondent had given SP1 a bribe did not automatically make SP1 an accomplice. SP1 had initiated nothing. The respondent made all the moves to corrupt SP1. Further, s 44 of the Act relieved SP1 of being an accomplice. SP1 had clearly no intention of appropriating the money given to him. He could not be labeled an accomplice in view of his conduct in: (i) telling SP6 of the moves to corrupt him; (ii) alerting the ACA before the commission of the offence; (iii) following the ACA's instructions; (iv) not being swayed by the respondent's gratuitous attempt. By not being an accomplice, there was no requirement for the corroboration of his (SP1's) evidence (see paras 15 & 18–19); *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 referred; *R v Ready and Manning* [1942] VLR 85 (CA) referred; *Sathasivam and 2 others v Public Prosecutor* [1949] MLJ 102 referred.
- (3) The evidence of the prosecution's witnesses remained steadfast and unimpeached. Even assuming that SP1 was an accomplice, under s 133 of the Evidence Act 1950, he would still be a competent witness against the respondent whose conviction was not illegal merely because it proceeded upon SP1's uncorroborated evidence. Regardless of SP1's status, due to the abundance of evidence to substantiate his evidence on the gratification payment, the prosecution had successfully established a prima facie case against the respondent on the first charge (see paras 20–21).
- (4) The respondent's defence constituted mere denials and did not convince the Court of Appeal. From the totality of the evidence, the respondent had failed to rebut the prosecution's case. The prosecution had successfully established a case beyond reasonable doubt against the respondent on the first charge. The Court of Appeal would thus affirm of the decision of the sessions' court and maintain the same sentence as it was suitable and appropriate in the circumstances of the case (see paras 22–23).
- (5) Although the prosecution has complete discretion whether to call a particular witness, there are situations when it must call a certain witness or risk an adverse inference taken against it. In the instant case, the non-calling of a certain witness had worked against the prosecution's interest as that witness was present when the alleged handing over of the gratification in respect of the second charge took place. It was thus unsafe to allow the appeal on the second charge, as the Court of Appeal was not convinced that the prosecution had established a prima facie case against the respondent at the end of the prosecution's case (see para 25); *Adel Muhammed el Dabbah v Attorney-General for Palestine* [1944] AC 156; *Ti Chuee Hiang v Public*

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- A *Prosecutor* [1995] 2 MLJ 433 referred; *Seneviratne v R* [1936] 3 All ER 36 referred; *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 referred.

[Bahasa Malaysia summary]

- B Responden dituduh di mahkamah sesyen atas dua pertuduhan memberi suapan di bawah s 10(b)(aa) Akta Badan Pencegah Rasuah 1997 ('Akta'). Kes pendakwaan ialah bahawa responden memberi SP1 sejumlah wang untuk memujuk SP1 agar tidak menerima tawaran penyelesaian daripada penghutangnya yang telah bankrup, iaitu SP6 agar dia kekal bankrap, lantaran
- C tidak membolehkannya bertanding merebut jawatan tinggi dalam satu organisasi politik. Responden merupakan petanding hebat bagi jawatan yang sama. Responden disabit dan dihukum atas kedua-dua tuduhan oleh hakim mahkamah sesyen tetapi semasa rayuan, Mahkamah Tinggi mengetepikan kedua-dua sabitan dan hukuman. Pendakwaan merayu ke Mahkamah Rayuan.
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Diputuskan, membenarkan rayuan pendakwaan terhadap tuduhan pertama sahaja:

- (1) Daripada keterangan saksi-saksi pendakwaan (SP1, SP3 dan SP10),
- E Mahkamah Rayuan berpuas hati bahawa responden sesungguhnya memberi suapan rasuah kepada SP1. Alasan suapan tersebut adalah agenda tersembunyi responden untuk mengetuai bahagian UMNO Tapah. Keterangan langsung pembayaran responden suapan tersebut banyak sekali, walau bagaimanapun, pendakwaan memilih untuk
- F melaksanakan prerogatifnya dengan menggunapakai s 42(1) Akta (lihat perenggan 13–14).
- (2) Fakta bahawa responden memberi rasuah kepada SP1 tidak secara automatiknya menjadikan SP1 rakan sejenayah. SP1 tidak memulakan apa-apa. Responden memulakan semua langkah untuk
- G merasuah SP1. Selanjutnya, s 44 Akta melepaskan SP1 sebagai rakan sejenayah. SP1 jelas tidak mempunyai niat mengambil wang yang diberikan kepadanya. Dia tidak boleh dilabelkan sebagai rakan sejenayah berikutan perilakunya dalam: (i) memberitahu SP6 langkah-langkah untuk merasuahnya; (ii) memberi amaran kepada
- H BPR sebelum perbuatan melakukan kesalahan tersebut; (iii) menurut arahan-arahan BPR; dan (iv) tidak terpengaruh oleh percubaan rasuah responden. Dengan tidak menjadi rakan sejenayah, tiada keperluan menyokong keterangannya (lihat perenggan 18–19); *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 dirujuk; *R v Ready and Manning* [1942] VLR 85 (CA) dirujuk; *Sathasivam and 2 others v Public Prosecutor* [1949] MLJ 102 dirujuk.
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- (3) Keterangan saksi-saksi pendakwaan kukuh dan tidak dicabar. Walaupun menganggap SP1 merupakan rakan sejenayah, di bawah

s 133 Akta Keterangan 1950, dia masih merupakan saksi yang boleh dipercayai menentang responden yang mana sabitannya tidak menyalahi undang-undang hanya disebabkan ia diteruskan berdasarkan keterangan SP1 yang tidak disokong. Tanpa mengambilkira kedudukan SP1, disebabkan keterangan yang sangat banyak untuk menyokong keterangannya terhadap pembayaran suapan tersebut, pendakwaan telah berjaya membuktikan kes prima facie terhadap responden atas tuduhan pertama (lihat perenggan 20–21).

- (4) Pembelaan responden hanyalah penafian semata-mata dan tidak meyakinkan Mahkamah Rayuan. Daripada keseluruhan keterangan, responden gagal menyangkal kes pendakwaan. Pendakwaan telah berjaya membuktikan kes melampaui keraguan munasabah terhadap responden atas tuduhan pertama. Oleh itu, Mahkamah Rayuan mengesahkan keputusan mahkamah sesyen dan mengekalkan hukuman yang sama kerana sesuai dan berpatutan dalam keadaan kes (lihat perenggan 22–23).

- (5) Walaupun pendakwaan mempunyai budi bicara penuh sama ada untuk memanggil saksi yang tertentu, terdapat situasi apabila pendakwaan mesti memanggil saksi tertentu atau mengambil risiko inferens yang menentang terhadapnya. Dalam kes ini, tidak memanggil saksi tertentu tidak membantu kepentingan pendakwaan kerana saksi itu hadir apabila penyerahan suapan yang dikatakan tersebut berlaku berkaitan tuduhan kedua. Oleh itu tidak selamat membenarkan rayuan tersebut bagi tuduhan kedua kerana Mahkamah Rayuan tidak diyakinkan bahawa pendakwaan telah membuktikan kes prima facie terhadap responden pada akhir kes pendakwaan (lihat perenggan 25); *Adel Muhammed el Dabbah v Attorney-General for Palestine* [1944] AC 156; *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 dirujuk; *Seneviratne v R* [1936] 3 All ER 36 dirujuk; *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 dirujuk.]

Notes

For cases on Anti-Corruption Act 1997 generally, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 22–29.

For cases on corruption cases, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 37–44.

For cases on failure of prosecution to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 160–166.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)

Adel Muhammed el Dabbah v Attorney-General for Palestine [1944] AC 156 (refd)

- A** *Ng Kok Lian & Anor v PP* [1983] 2 MLJ 379, FC (refd)
Pendakwa Raya v Md Nor (MT Melaka RJ(1) 42–5002) (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324, HC (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685, FC (refd)
R v Ready and Manning [1942] VLR 85, CA (refd)
- B** *Sathasivam and 2 others v PP* [1949] MLJ 102 (refd)
Seneviratne v R [1936] 3 All ER 36, PC (refd)
Thavanathan Balasubramaniam v PP [1997] 3 CLJ 150, FC (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (refd)
- C** **Legislation referred to**
 Anti-Corruption Act 1997 ss 2, 10(b)(aa), 42(1), 44, 44(2)
 Criminal Procedure Code s 180
 Evidence Act 1950 s 133
- D** **Appeal from:** Criminal Appeal No 42–26 of 2005 (High Court, Ipoh)
Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Muhammad Shafee Abdullah (Badrul Munir Bukhari with him) (Shafee & Co) for the respondent.

E **Suriyadi JCA (delivering judgment of the court):**

- F** [1] At the sessions court the respondent was charged with two counts of giving gratification under s 10(b)(aa) of the Anti-Corruption Act 1997 ('the Act'), with the charges reading as follows:

The first charge:

- G** Bahawa kamu pada 6 April 2001, jam lebih kurang di antara 6.00 hingga 7.00 petang, di rumah No. 29, Lengkok Pasar, Rapat Setia, Ipoh, di dalam Daerah Kinta, di dalam negeri Perak, secara rasuah telah memberi suapan iaitu, wang tunai sebanyak RM2,000.00 kepada Mohd Kamal bin Rabaai, sebagai dorongan untuk Mohd Kamal bin Rabaai supaya tidak menerima tawaran penyelesaian daripada Pazli bin Abdullah Sani, yang telah dihukum muflis akibat tuntutan hutang ke atasnya oleh Mohd Kamal bin Rabaai agar Pazli bin Abdullah Sani akan kekal muflis dan tidak layak bertanding menentang kamu bagi jawatan Ketua UMNO bahagian Tapah pada 22 April 2001 dan dengan demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 10(b)(aa) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) dan boleh dihukum di bawah seksyen 16 Akta yang sama.

- I** The second charge:

Bahawa kamu pada 9 April 2001, jam lebih kurang di antara 8.30 hingga 11.00 malam, di rumah No. 29, Lengkok Pasar, Rapat Setia, Ipoh, di dalam Daerah Kinta, di dalam negeri Perak, secara rasuah telah memberi suapan iaitu, wang tunai

sebanyak RM5,000.00 kepada Mohd Kamal bin Rabaai, sebagai dorongan untuk Mohd Kamal bin Rabaai supaya tidak menerima tawaran penyelesaian daripada Pazli bin Abdullah Sani, yang telah dihukum muflis akibat tuntutan hutang ke atasnya oleh Mohd Kamal bin Rabaai agar Pazli bin Abdullah Sani akan kekal muflis dan tidak layak bertanding menentang kamu bagi jawatan Ketua UMNO bahagian Tapah pada 22 April 2001 dan dengan demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 10(b)(aa) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) dan boleh dihukum di bawah seksyen 16 Akta yang sama.

[2] Section 10(b)(aa) reads thus:

10 Any person who by himself, or by or in conjunction with any other person —

(a) ...

(b) *corruptly* gives, promises or offers to any person whether for the benefit of that person or of another person,

any gratification as an inducement to or a reward for, or otherwise on account of —

(aa) any person doing or *forbearing to do anything* in respect of any matter or transaction, actual or proposed or likely to take place; or

(bb) ...

shall be guilty of an offence. (Emphasis added.)

[3] In a gist, the respondent faced two charges of giving corrupt gratification on two separate occasions to SP1, in order to persuade him not to accept an offer of settlement from his bankrupted debtor ie SP6. Without that settlement SP6, would remain a bankrupt, hence disabling him from standing for election as head of the Tapah UMNO branch on 22 April 2001. From facts that surfaced, the respondent was to be the other serious contender for the same post. At the end of the hearing before the learned sessions court judge, the respondent was found guilty, convicted, and accordingly sentenced for the two charges. Being dissatisfied, the respondent appealed to the High Court and was successful whereupon both convictions and sentences were set aside. The prosecution then filed the necessary notices of appeal to this court against the acquittal and discharge of both the charges. After hearing the appeal, we only set aside the High Court's order as regards the first charge. We reinstated the finding of guilt, conviction, and sentence of two years jail and a fine of RM10,000 in default six months jail.

[4] The prosecution's case depended very much on the testimony of its witnesses especially of SP1, SP3, and SP10, and after discussing them, the

A learned sessions court judge concluded that SP1 and SP3 were not accomplices. He held that s 44 of the Act was applicable. This provision reads:

44 Evidence of accomplice and agent provocateur

- B** (1) Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act —
- (a) no witness shall be regarded as an accomplice by reason only of such witness having —
- C** (i) accepted, received, obtained, solicited, agreed to accept or receive or attempted to obtain any gratification from any person;
- (ii) give, promised, offered or agreed to give any gratification; or
- (iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;
- D** (b) no agent provocateur, whether he is an officer of the Agency or not, shall be presumed to be unworthy of credit by reason only of his having attempted to commit, or to abet, having abetted or having been engaged in an criminal conspiracy to commit, such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person; and
- E** (c) any statement, whether oral or written, made to an agent provocateur by such person shall be admissible as evidence at his trial.
- F** (2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of an accomplice or agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence.

G [5] Apart from not labeling SP1 an accomplice, the learned sessions court judge also found his credibility unimpeachable. He was a witness who had no particular interest in this case and one who expected no financial gain. His reaction to inform the Anti-Corruption Agency ('ACA') of the move to corrupt him and filing of a report merely confirmed his credibility. In terms of procedure, there was no necessity for him to lodge the report that very night.

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I [6] As regards SP3, the sessions court had concluded that the respondent had asked him to contact SP1 and request him not to settle the bankruptcy matter with SP6. As SP1 did not know the respondent or his residence, his role was to show the direction of the house and mutually introduce them. He was never involved in the handing over of the money to SP1 by the respondent. There was certainly a dearth of evidence to show that SP3 knew money was about to be handed over to SP1 that night of 6 April 2001.

[7] Before us, as at the sessions court and the High Court, the respondent canvassed that he was entitled to the acquittals, as there were many loopholes in the testimony of the prosecution's witnesses. The special target was SP1 whom the learned High Court judge painted as an undiluted accomplice, with his evidence peppered with inconsistencies, and his testimony requiring corroboration. He made specific findings of facts and rejected the sessions court judge's findings despite the latter's vantage position.

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[8] With the above scenario in mind, let us now scrutinise the evidence of these three relevant witnesses in more detail. SP1 is a contractor and had past business dealings with SP6, and due to non-payment of a balance of RM90,000 by the latter, SP1 on 5 April 2001 successfully obtained a bankruptcy order against him. The next day ie 6 April 2001 SP1 and SP6 went to the official assignees' office ('OA') to settle the matter, eventuating with the indebted sum reduced to RM20,000. While discussing with SP6 at the OA, SP3 telephoned, requesting SP1 not to settle the matter with SP6, and to meet the respondent later. SP1 replied that he would think about it. After that telephone call SP1 received a call from SP10 communicating the same message. Like the earlier telephone call, he replied that he would think about the suggestion not to settle the matter.

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[9] After receipt of those two telephone calls, he realised that there was a move to corrupt him. He then contacted the ACA. He also telephoned SP6 and told him of the two calls of SP3 and SP10. After Friday prayers, he and SP6 went to the ACA office and lodged a report (P4). At 4pm on the same day, the respondent contacted SP1 by telephone. The former asked him to come to his house, and told him too not to settle the debt with SP6. SP1 replied that he did not know the way to his house and the respondent replied that SP3 would contact him regarding the directions. Later SP3 telephoned him and by 6pm, they ended up at the respondent's house.

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[10] At his house, the respondent entertained them. He then reiterated to SP1 not to settle the matter with SP6 and further said he could give more. The respondent then gave SP1 RM2,000 at that stage and the latter thereafter left. On the way out SP1 tore certain documents that emanated from the OA's office and thereafter shoved them into his pocket. There was some dispute as to whether those documents were actually already with SP1 when at the respondent's house, or given by the respondent when he was on the way out. At late evening, still on 6 April 2001, he contacted the ACA and told the agency that he had just received RM2,000 from the respondent. SP1 was told to send the money and the torn documents to them the next day, and of which he did. On 7 April 2001, he handed over the money and the torn documents to the ACA.

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- A [11] Before touching on the quality of SP1's evidence, let us peruse the evidence of SP3 and SP10 first. I begin with the testimony of SP3. This witness testified that the respondent had contacted him, requesting SP1 be contacted, and to extend an invitation to his house. He did contact SP1 and the latter told him to tell the respondent to call him back. Later SP1 called back telling SP3
- B that the respondent had contacted him whereupon they met at the Gopeng mosque. He admitted that in the afternoon of 6 April 2001, together with SP1, they went to the respondent's house, as SP1 did not know the way let alone knew the respondent at all. He admitted that perhaps those were the reasons
- C why the respondent sought out his help. SP3 admitted that at the respondent's home, the respondent discussed with SP1, and there requested that no settlement take place between him and SP6. This fact of SP3 being at the respondent's house was never challenged, and there he heard the respondent say, 'Jika boleh berunding dengan teman dulu'. In the course of it RM2,000
- D was handed over to SP1. When handing the money, the respondent said 'Ini yang mulanya'. SP3 admitted not knowing the actual amount though he saw the handing over of the money. He also saw SP1 tearing certain documents in front of the respondent and shoving the torn documents into his pocket.
- E [12] I now touch on SP10's evidence who testified that he contacted SP1 in the morning of 6 April 2001. The purpose was to inform him of the respondent's instruction of not settling the bankruptcy matter with SP6 and that he could pay more. SP1 replied that politicians could not be believed. SP10 then informed the respondent that SP1 was not receptive. That was his
- F only role in this case.
- G [13] From the testimonies of SP1, SP3 and SP10 this panel was satisfied that on 6 April 2001 between 6pm to 7pm the respondent had given RM2,000 to SP1 at his house, with it being *corrupt* payment. As under s 2 of the Act, 'gratification' includes money and no legal activism is needed here. Apart from the oral testimonies of those witnesses who testified that they were instructed to communicate certain nefarious instructions to SP1, or heard the requests of the respondent, and also saw the handing over of the gratification sum, there was
- H no reason for the respondent to give away RM2,000 to someone whom he did not know. The hidden agenda of wanting to be the head of the UMNO division of Tapah must be the very basis of the gratification payment. In a nutshell the direct evidence of the payment being corrupt in nature, as adduced by the prosecution, was in abundance.
- I [14] Despite the availability of direct evidence, perhaps wanting to take the short route, the prosecution had invoked the statutory presumption as borne out under s 42(1) of the Act. That is the prerogative of the prosecutor. By allusion to this evidential provision the RM2,000 payment thus was presumed

to be a corrupt payment offered as an inducement as per the charges. For completeness, we supply the latter provision:

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42 Presumption in certain offences

- (1) Where in any proceedings against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

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[15] As reflected from the above prognosis with the issue of whether the payment was 'corrupt' or not having been resolved the next issue for consideration is whether SP1 was an accomplice. In this case, the respondent had given SP1 a bribe. Does that automatically make SP1 an accomplice? We held the view that the answer has to be in the negative. SP1 had initiated nothing, whether in the form of contacting the respondent, or suggesting any proposal reciprocated by financial rewards. In fact, everything pointed to the respondent making all the provocative moves to corrupt this witness.

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[16] To add to the armoury of the prosecution, the above s 44 of the Act succinctly provides that no witness shall be regarded as an accomplice by reason only of such witness having accepted, received, obtained, solicited, agreed to accept or receive or attempted to obtain any gratification from any person. The court in *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 had occasion to say:

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Goh Leng Sai's case clearly shows that there can be no prima facie inference that a witness is an accomplice just because a bribe is given to him ...

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[17] Further to that, SP1 never kept that RM 2,000 as come the next day, as per instruction, the latter sum was handed over to the ACA. What is pertinent here is SP1's intention ie whether he intended to appropriate the gratification for keeps and thus advertently acquiesce to the criminal intention of the respondent. In *R v Ready and Manning* [1942] VLR 85 (CA) Mann CJ had opined (p 93):

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The only definition in the books of the word 'accomplice' which counsel were able to cite to us was that pronounced by Denman J in *R v Cramp* (1880) 14 Cox CC 390, who said that a witness would not be an accomplice unless she was privy to the criminal intent of the principal offender.

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A [18] Returning to the above s 44, this provision covers quite a wide scenario but by the reading of it, taking without more of the payment, relieves him of being an accomplice. In the above case of *Ng Kok Lian & Anor v Public Prosecutor*, the court remarked that, '... the mere taking of the money does not amount to a taking of a bribe if there is no intention to appropriate it as his property'.

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C [19] To indicate further that he had no intention of appropriating the RM2,000 was his want of silence. Apart from reporting to the agency, SP1 also told SP6. This conduct in fact began very much earlier ie when he told the ACA of his fears even before the commission of the offence at the respondent's house. By so alerting the ACA before the commission of the offence, let alone he never detracted from the agency's instructions or was swayed by the respondent's gratuitous attempt, up to the handing over of the money to the ACA, he thus could not be labeled an accomplice (*Sathasivam and 2 others v Public Prosecutor* [1949] MLJ 102). Not being an accomplice there was thus no requirement for corroboration.

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E [20] Before us, the learned DPP had successfully pointed to us the relevant consistent testimony of SP1 and SP3, and we were in absolute agreement with the view of the learned sessions court judge that the credibility of the prosecution's witnesses had remained steadfast and unimpeached. What if SP1 were an accomplice (*of which we are saying no*)? Under s 133 of the Evidence Act 1950 (apart from s 44(2) of the Act), an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. As this provision is clear, and ascertainable this court must yield to the intention of Parliament. In *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 Steve Shim CJ (Sabah and Sarawak), inter alia, said:

G ... The court then cited with approval the observation by Lord Simonds in *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 (HL) wherein he said that the duty of the court was to interpret the words of a statute that the Legislature had used. It is of course trite law that if the intention of the Legislature is expressed in words which are clear and explicit, the court must give expression to that intention. As *Bindra's Interpretation of Statutes*, (8th Ed), has stated:

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I If the intention of the Legislature can be ascertained all rules of construction must yield to the legislative intention (*Board of Trustees v Johan Steele* [1933] SCC (SC) 47). They cannot override the legislative intent specifically expressed in the enactment (*State of Up v Jaipal Singh Narsh* [1978] All L1 936). If the intention of the Legislature is clear, that intention constitutes the law.

The primary duty of the court is to give effect to the intention of the legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words used

have not acquired any technical meaning, they should be deemed to have been used in their ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary than to expound those words in their natural and ordinary sense. The words themselves alone in such case best declare the intent of the law giver (see *Bindra's Interpretation of Statutes* (8th Ed)).

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[21] Since an accomplice is a competent witness and regardless of SP1's status, due to the abundance of evidence to substantiate his evidence regarding the gratification payment, we were satisfied that the prosecution had successfully established a prima facie case for the first charge. The issue of whether the torn documents, as mentioned earlier, were already with SP1 prior to going to the respondent's house, or given by the latter on the way out, was so inconsequential that it could do little to whittle away the prosecution's case. What was undeniable was that even SP3 and the ACA officer confirmed their existence.

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[22] The respondent's defence was mere denial of the whole episode of 6 April 2001. At p 178 in his oral testimony he testified, '*Pada pertemuan pertama 6.4.2001 saya tak pernah membuat apa apa tawaran kepada Kamal (SP1 — ours). Pada tarikh yang sama saya tidak pernah memberi apa-apa wang kepada Kamal*'. In D28 (p 303 of the *rekod rayuan* of his cautioned statement) he said:

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(Dato' Azman bin Mahalan merujuk kepada cetakan diarinya pada 6.4.2001)

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16. Mengikut catatan diari saya, pada petang jam 2.30 saya berada di Parit, Perak kerana menghadiri lawatan YAB Perdana Menteri. Selepas itu saya balik dan sampai di rumah lebih kurang pukul 7.00 malam. Selepas Maghrib saya pergi ke Dewan 'Banquet' di Bangunan Perak Darul Ridzuan. Saya balik ke rumah pada 12.30 tengah malam. Saya tak pasti samada antara jam 7.00 malam, sebelum saya ke Dewan Banquet, itulah masanya kemungkinan Kamal dan Shaiduddin datang ke rumah sepertimana yang saya katakan tadi, iaitu kunjungan pertama En. Kamal. Dalam pertemuan itu, kalau tidak silap saya dia (Kamal) ada tunjukkan dokumen mengatakan Padzil cuba main-mainkan dia. Saya kurang pasti kandungan dokumen itu, tetapi Kamal amat marah ketika itu dan mengoyakkannya dua kali. *Saya tidak memberi apa-apa wang kepada Kamal sebab dia balik dan tidak meminta apa-apa bantuan daripada saya.*

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[23] This panel was unconvinced by the above mere denials, and without any other proof to reasonably dislodge the prosecutions' case, the respondent was in trouble (*Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324). The upshot was that we were satisfied from the totality of the evidence that the respondent had failed to rebut the prosecution's case (*Thavanathan Balasubramaniam v Public Prosecutor* [1997] 3 CLJ 150; *Pendakwa Raya v Md*

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- A *Nor* (MT Melaka RJ(1) 42–5002)). We therefore were satisfied that at the end of the defence case, the prosecution had successfully established a case beyond reasonable doubt against the respondent for the first charge hence our affirmation of the decision of the sessions court judge for it. We also later meted down the same sentence, as it was suitable and appropriate in the circumstances of the case.
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- [24] I now touch on the incident that relates to the second charge. On 9 April 2001, the respondent had called SP1 after mid-day. The same instruction was uttered to him ie not to settle the matter. After that telephone call, SP1 immediately called the agency. At Hotel Seri Malaysia, an ACA officer gave him certain instructions in the event the respondent was to call him again. After the *asar* prayers he received a ‘missed call’ from the respondent. SP1 called the respondent and the latter requested him to go to his house again at about 8pm. Later he received another call requesting him to change the time to 8.30pm. After this call, he contacted the ACA. The agency again gave him certain specific instructions regarding the course of action to be undertaken. He then went to the respondent’s home alone. Before proceeding to the respondent’s house, the ACA checked his car and frisked him for any hidden money. It found none. He arrived at the respondent’s home at 8.30pm. Later four persons came, with one of them being Osmani, who likewise told him not to settle the matter. He also stated that the respondent could give more money than SP6. The respondent merely nodded his head. That night the respondent gave SP1 RM5,000. After leaving that house he went straight to Hotel Seri Malaysia and met an ACA officer ie one Mohammad bin Hassan whereupon he handed him that RM5,000.
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- [25] It is trite that the prosecution has the complete discretion whether to call a particular witness or not (*Adel Muhammed el Dabbah v Attorney-General for Palestine* [1944] AC 156). Yet there are situations where the prosecution must call certain witnesses or otherwise an adverse inference may be taken against it for that failure (*Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; *Seneviratne v R* [1936] 3 All ER 36; *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16). We held the view here that the non-calling of Osmani had worked against its interest as he was present when the alleged handing over of the RM5,000 took place. The panel therefore held that it was unsafe to allow the appeal on the second charge, as to begin with, we were not convinced that the prosecution had established a *prima facie* case at the end of the prosecution’s case (s 180 of the CPC).
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- [26] To summarise the outcome of the appeal, this panel allowed the appeal only as regards the first charge. The High Court order in respect of the first charge was thus set aside. The sessions court’s decision of conviction pertaining to the first charge was reinstated and affirmed. The respondent was sentenced

to two years of imprisonment with immediate effect and a fine of RM2,000 and in default of which he would undergo another six months jail. A

Appeal allowed against the first charge.

Reported by Andrew Christopher Simon B

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